Case No. SC85889

IN THE MISSOURI SUPREME COURT

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION,
Appellants and Cross-Respondents,

-vs.-

DODSON INTERNATIONAL PARTS, INC.,
Cross-Appellant,

HOUSTON CASUALTY COMPANY,
Respondent,

HOWE ASSOCIATES, INC.,
Defendant.

APPEAL FROM THE 16TH JUDICIAL CIRCUIT COURT

THE HONORABLE LEE E. WELLS, JUDGE

SUBSTITUTE REPLY BRIEF OF CROSS-APPELLANT DODSON INTERNATIONAL PARTS, INC.

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ARGUMENT

1. Plaintiffs lacked standing because entire cause of action was assigned to Houston Casualty Company

Plaintiffs' Response Brief ("Response") attempts to argue that Plaintiffs retained standing to bring suit and did not assign their entire right of action to Houston, despite the plain language in the Proof of Loss that "we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss." Plaintiffs make no effort to address the Missouri Supreme Court decision cited and discussed in Dodson's Brief, which found that language very similar to that contained in Plaintiffs' Proof of Loss constituted an assignment to the insurer of plaintiff's entire claim, Steele v. Goosen, 329 S.W.2d 703, 711 (Mo. 1959). Instead, Plaintiffs contend the Proof of Loss is governed by Texas law and that Missouri cases are unhelpful.

There is no need to make a choice between Texas or Missouri law on the effect of assignment of all title, both legal and equitable, to the cause of action, because the law of Texas is the same as Missouri on the essential point. Under Texas law, as under Missouri law, an unconditional assignment of all title, both legal and equitable, to a cause of action divests the assignor of all right to sue on the cause of action. River Consulting, Inc. v. Sullivan, 848 S.W.2d 165, 167 (Tex. App. 1992); Duke v. Brookshire Grocery Co., 568 S.W.2d 470, 472-473 (Tex.Civ.App. 1978); Amsler v. D.S. Cage & Co., 247 S.W. 669, 670 (Tex. Civ. App.

1923); Winn v. Ft. Worth & R.G. Ry. Co., 12 Tex. Civ. App. 198, 33 S.W. 593 (1896).[1] Moreover, under Texas law, the language "assign . . . all right . . . against any person" is sufficient to constitute assignment of the entire claim.

In River Consulting, the Court affirmed summary judgment entered against an engineering firm on the ground that it had assigned all of its interests in the causes of action asserted against defendants and therefore was barred from pursuing its claims against defendants in its own right. 848 S.W.2d at 167.

In Duke, the Court affirmed the entry of summary judgment against plaintiff in a personal injury action by reason of plaintiff's execution of a release in favor of a third party which provided that any claims not released "are hereby assigned in full to the parties hereby released." 568 S.W.2d at 472. The Court stated the general rule that "[i]f the owner of a cause of action assigns all of his interest therein, parting with both the legal and the equitable title, he cannot bring suit thereon unless he does so, in a representative capacity and upon proper authority, for the owner of the claim." Id. The Court explained that "such an assignor no longer owns any part of the claim" and thus "lacks that justiciable interest which is necessary to maintain any action." Id. at 472-473. The court found the assignment language was sufficiently broad and explicit to divest all of plaintiff's interest in the cause of action and vest it in the assignee. Id. at 473.

In Winn, the Court considered whether plaintiff Winn could recover a statutory penalty

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[1] Missouri cases are in accord. See Steele, 329 S.W.2d at 711 and other cases cited at page 33 of Dodson Brief.

for refusal to receive and ship livestock and for damages for injuries to other stock received and shipped. The Court concluded that Winn had assigned the entire right of action on which the suit was founded to the Gulf, Colorado & Santa Fe Railroad Company prior to suit, in a written assignment which expressly authorized the assignee to sue on the cause of action assigned in Winn's name. 12 Tex.Civ.App. at 199, 33 S.W.2d at 593. The Court applied the principle that "[i]f the assignment divested appellant of all title, both legal and equitable, to the cause of action, [plaintiff] was not entitled to sue," found that plaintiff's "entire claim, demand and right of action" was transferred in "broad and comprehensive" language, and held that the assignment divested plaintiff of all legal and equitable title to the cause of action. 12 Tex.Civ.App. at 200, 33 S.W.2d at 594.

In Amsler, the Court reversed the trial court's denial of defendant's motion for an instructed verdict on the ground that plaintiff had assigned all his right, title and interest, legal and equitable, to the cause of action for overpayment for a carload of peanuts. Plaintiff testified that his records showed the claim was transferred to a corporation before suit, and that if there should be a recovery, the money would be turned over to the corporation. 247 S.W. at 669-670. The Court held that "[t]he effect of the assignment or transfer of the claim to the corporation being to divest the appellee of his ownership, an action on the chose could no longer be brought in his name." 247 S.W. at 670.

Texas case law makes clear that the assignment contained in the Proof of Loss in this case divested Plaintiffs of all interest in the cause of action, and vested it in Houston Casualty Company.

Plaintiffs urge the Court to narrowly construe the words "this loss" and to read the

clause authorizing the insurance company to sue, compromise or settle in Plaintiffs' names "to the extent of the money aforesaid" as warranting the interpretation that the assignment to Houston was not of the entire cause of action. Both of these arguments are without merit.

Plaintiffs contend the phrase "this loss" referenced the loss of the aircraft caused by the off-airport landing on April 9, 1998, not the loss of the aircraft caused by Dodson's subsequent handling of the aircraft. Plaintiffs' narrow construction is inconsistent with the language of the assignment, under which Plaintiffs assigned to Houston their entire legal and equitable right, "all right, interest or things in action," and without limitation as to person, but "against any person or corporation, who may be liable or hereafter adjudged liable for this loss." The language is as broad and comprehensive as in Winn, 12 Tex.Civ.App. at 200, 33 S.W.2d at 594, and Steele, 329 S.W.2d at 711.

Plaintiffs' narrow construction is also inconsistent with their own theory of causation, that Dodson caused the aircraft's loss by causing Houston's decision to declare the aircraft a total loss. The Proof of Loss containing the assignment of "all right, interest, or things in action against any person or corporation" was signed after Houston decided to pay for the loss, and in consideration of such payment. The assignment of "all" things in action to Houston was thus of the entire cause of action against Dodson arising out of the aircraft loss.

The use of the word "assign" in the operative clause is significant because the word "assign" is a comprehensive term, understood to convey a transfer of the whole of a right. Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105, 110 (Mo.App.1971). In Winn, the Court found a complete assignment where plaintiff assigned the "entire claim, demand, and right of action." Similarly, in Steele, plaintiff assigned "all claims, rights and demands against

any person, persons, corporation or property arising from or connected with such loss or damage." In the case at bar, the object of the verb "assign" is "all right, interest, or things in action against any person or corporation, who may be liable. . . ." This is sufficient to assign the entire claim under either Texas or Missouri law.

Plaintiffs' argument that use of the phrase "to the extent of the money aforesaid" prevents finding an assignment ignores the holding in Steele, in which the phrase "to the extent of the amount hereby paid" was held "immaterial" where the language otherwise demonstrated an assignment to the insurer of plaintiff's entire claim for property damage. 329 S.W.2d at 711-712. Plaintiffs simply ignore the Steele case.

Plaintiffs argue the phrase allowing Houston to sue or settle in Plaintiffs' names negates an assignment. Response, p. 38. Plaintiff overlooks the fact that in Winn, the transfer expressly authorized the transferee to sue on the cause of action assigned in Winn's name, yet the Court found the assignment of the appellant's "entire claim, demand and right of action" must be held to divest him of all legal and equitable title to the cause of action. 12 Tex.Civ.App. at 199-200, 33 S.W. at 593-594. Under Texas law as under Missouri law, authorization for the assignee to sue on the cause of action in the assignor's name does not negate finding an assignment.

Plaintiffs cite Fort Worth & Denver Ry. Co. v. Ferguson, 261 S.W.2d 874 (Tex. Civ. App. 1953) as supporting their position. Response, page 34. Plaintiffs' reliance on Fort Worth is misplaced, as that case shows that Plaintiffs have no standing to proceed with the claim they assigned to Houston. The opening sentence of the paragraph quoted by Plaintiffs from Fort Worth states that "In Texas, the plaintiff may, with the authority and consent of the

subrogee-assignee, sue upon a cause of action which he has totally transferred, where he "sues for the use and benefit of such transferee." 261 S.W.2d at 880. This sentence establishes two conditions for the assignor who has totally transferred a cause of action to bring suit: (1) that he has the authority and consent of the assignee; and (2) that he sues for the use and benefit of the assignee." Neither of these conditions is satisfied in this case, because Houston has not authorized or consented to Plaintiffs bringing this suit, and Plaintiffs do not purport to be and are not suing for the use and benefit of Houston.

Plaintiffs also claim that they may bring the suit under other language found in Fort Worth, because Plaintiffs claimed to have transferred only a part of the cause of action. However, the language "assign, transfer and subrogate to [Houston] all right, interest or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss" is comprehensive, and effective to convey the entire cause of action. Steele; Winn. Plaintiffs did not transfer only part of the cause of action, but assigned it "all."

Subrogation and assignment are distinct, but are not, as Plaintiffs assert, mutually exclusive. Subrogation is the transfer of equitable title to a claim in which legal title remains in the original claimant; assignment is the transfer of both legal and equitable title to a claim. Assignment includes everything involved in subrogation–the passage of equitable rights–and in addition involves the passage of legal rights from the assignor to the assignee. Plaintiffs' argument that "an assignment and a subrogation cannot coexist in the same contractual provision" is not accurate. In Steele, plaintiff assigned his entire claim for property damage to the insurer, even though the instrument provided that "said Company is subrogated in the place of and to the claims and demand of the insured against" other persons. 329 S.W.2d at

711. The Steele case conclusively refutes Plaintiffs' contention that the use of the word "subrogated" negates assignment of all of the claims.

Plaintiffs do not cite any case to support the proposition that the assignment of all rights against any person is in any way ambiguous, or may be interpreted as a subrogation provision. Accordingly, the Judgment should be reversed because Plaintiffs were without standing to bring the suit.

2. Failure of proof of lost profits

Plaintiffs contend they presented sufficient evidence of lost profits despite Plaintiffs' failure to subtract amounts for various categories of expenses, some of which are fixed costs and some of which are variable costs, including: overhead, hangar rental, advertising, telephone, insurance for the aircraft, salary of a pilot and a co-pilot to fly the airplane, health benefits, workers compensation insurance, taxes, pilot training, training expenses paid to pilots and co-pilots, debt payments on the airplane and depreciation. Tr. 355:3-22; 450:10-451:22, 453:2-22; 454:3-20. Plaintiffs assert that it is not necessary to subtract fixed expenses in arriving at the lost profits calculation, simply ignoring the explicit holding of Meridian Enterprises Corp v. KCBS, Inc., 910 S.W.2d 329, 331-32 (Mo.App. 1995) that the failure to introduce evidence of overhead expenses such as rent or mortgage, utilities, support staff salaries or other overhead costs and failure to present evidence the event giving rise to claimed lost profits would have constituted such a small portion of plaintiff's overall revenues as not to increase its expenses justifies granting a directed verdict for defendants for failure to make a submissible case of lost profit damages. 910 S.W.2d at 332. The failure to deduct depreciation alone establishes the insufficiency of the proof of lost profits. See cases cited

at pages 62-64 of Dodson Brief.

Plaintiffs' reliance on Highlife Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 503 (Mo. 1992) is misplaced, because in this case there was no evidence that Plaintiffs' operating expenses would not increase if it had an additional Falcon 20 aircraft in operation. Plaintiffs introduced no evidence that the amount of revenue attributable to an additional aircraft would have constituted such a small portion of Plaintiffs' overall revenues as not to increase its overhead expenses of administrative personnel, office rent and the like. Absent such evidence, omitting such expenses renders the evidence insufficient. Meridian, 910 S.W.2d at 332. Moreover, Plaintiffs admitted failing to deduct a variety of expenses that certainly would be incurred with the operation of an additional aircraft, including hangar rental, interest on debt to acquire the aircraft (as the downed aircraft was financed with Compass Bank, a joint payee on Houston's check for $1,500,000, Ex. 5, Tr. 408:15-25, 409-410:6), depreciation of the aircraft, insurance on the aircraft, pilot salaries, training, insurance and other expenses. The failure to consider and deduct such expenses results in Plaintiffs' having failed to make a submissible case.

Plaintiffs urges this Court to disregard the requirement of the Missouri Supreme Court in Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968) and other cases cited at pages 61-64 of Dodson's initial Brief, that proof of income and expenses for a reasonable anterior period is "indispensable" to support a claim for lost profits. Numerous cases state that in order for a plaintiff to meet its burden of presenting competent proof of anticipated profits it is "indispensable that this proof include the income and expenses of the business for a reasonable anterior period, with a consequent establishing of the net profits during the previous period."

Dodson Brief, 61-64.

It is undisputed that Plaintiffs' proof in this case did not meet the requirement for proof of net profits for a reasonable anterior period, because the plaintiffs' evidence focused not on an "anterior period" but on the period after the claimed loss, from April, 1998 through August, 1999. Dodson Substitute Brief ("Dodson Brief") Appendix, p. A-5. No evidence showed what Plaintiffs' net profit was for any period before April, 1988. Response at p. 43 asserts that "[p]rofits of the business for a reasonable anterior period are not required" and that "it was not necessary for Ameristar to introduce evidence of profits from anterior periods because Ameristar introduced evidence of net profits." In support of these sweeping statements, which are directly contradicted by the statements regarding "indispensable" proof in Coonis and other cases cited at pages 61-64 of Dodson's Brief, Plaintiffs rely only on a passage from Whitman's Candies. In Whitman's Candies, Plaintiff introduced expert testimony of a consumer psychologist, based on studies of consumer behavior and market research, that plaintiff would lose sales of 2.711 million boxes of candy over a three year period because of defendant's breach of contract. 974 S.W.2d at 523. The buyer's president testified that buyer's annual sales were at $75 million in 1996, that buyer had been profitable, and made $1.79 profit per box of chocolates. Id. at 526. The Court of Appeals held that under the appropriate standard of review, given the clear establishment of a substantial pecuniary loss to the plaintiff, there was sufficient evidence of net profits. Unlike Whitman's Candies, in this case, there is no expert evidence of any customers or revenue miles lost by reason of the lack of an additional aircraft, and nothing but speculation supports finding plaintiffs would have had additional cargo business in the absence of any data showing past profit and trends or of any

of expert testimony of consumer behavior or market research. Whitman's Candies distinquished Coonis on the ground that in that case, the only proof of damages was a gross rather than net figure, and concluded that Whitman's evidence was different in that its president testified as to the gross sales and the net profits.

The treatment given to Coonis in the Whitman's Candies case is superficial, and cannot in any event be read to overrule the principle stated by the Missouri Supreme Court in Coonis and other cases cited in Dodson Brief, 61-64, that "proof of the income and expenses of the business for a reasonable time anterior to its interruption, with a consequent establishing of the net profits during the previous period, is indispensable." This principle cannot be ignored by the simple expedient of distinguishing Coonis, without explaining why the rule is not controlling. To the extent the Whitman's Candies case adopts a rule inconsistent with the principle stated in Coonis, dispensing with what has again and again been stated to be indispensable, Whitman's Candies is simply wrong, and is an aberration which should be overruled.

ConAgra, Inc. v. Inland River Towing Co., 252 F.3d 979 (8th Cir. 2001), an admiralty case involving a claim for loss of use of barges, does not support Plaintiffs' contentions, because the method of computation in evidence in ConAgra is different than that employed by Plaintiffs and the testimonial evidence and records introduced in ConAgra, unlike that in the case at bar, supported the lost profit claim. In ConAgra, plaintiff introduced regularly-kept records that showed the company's average fleetwide earnings per day for its fleet of barges. 252 F.3d at 981. Unlike ConAgra, Plaintiffs in this case have not introduced records to show the average fleetwide revenue and expenses. No regularly-kept records were introduced in this

case; only four pages of aircraft utilization summaries and Plaintiffs' president's calculation sheet. Exs. 134-138; Dodson Brief Appendix, A-5 to A-9. Plaintiffs subtracted only two categories of expenses (fuel and maintenance) rather than the fleetwide expense totals. Plaintiffs' failure to subtract expenses resulted in a calculation that was not analogous to the fleetwide net barge earnings per day figure used in ConAgra. Plaintiffs' failure to introduce actual records of revenue and expenses for a reasonable anterior period resulted a failure to present sufficient proof.

Plaintiffs make no attempt to explain why the numbers regarding hours of use of aircraft in the few pages of "summaries" introduced were inconsistent. As detailed at pages 24-29 of Dodson Brief, the hours of aircraft use reported in Exhibits 135 and 136 (Appendix A-6 and A-7) reflect numerous differences from the hours of use for the same aircraft in the same months reported in Exhibits 137 and 138 (Appendix A-8 and A-9). Twenty-three such differences are identified at pages 24-26 of Dodson Brief, and forty-eight more can be seen by comparing Ex. 136 to 138, as detailed at pages 26-29 of Dodson Brief. The entire damage calculation depends on the accuracy of the hours of use figures, and they are shown to be unreliable. Plaintiffs' failure to introduce the best available evidence to support the lost profits claim resulted in insufficient evidence. Meridian, and other cases cited at p. 64 of Dodson Brief.

3. Error in refusing contributory negligence instruction

The trial court erred in rejecting the contributory negligence instruction proffered by Defendant and submitting the case on comparative fault instructions, because Plaintiffs claimed only economic loss. Plaintiffs do not cite or discuss the five cases referenced at page

86 of Dodson Brief holding that comparative fault does not apply to a case involving purely economic damages. Plaintiffs insist that submitting the case on comparative fault instructions was not error, contending that Plaintiffs claimed property damage. Plaintiffs do not cite any case to support its claim that contributory negligence is not an absolute defense to the economic losses presented in this case.

The claim of property damage is not borne out by Plaintiffs' own evidence of damages or Plaintiffs' theory of how Defendant caused Plaintiffs' claimed loss. Plaintiffs' original Brief in this Court acknowledged that Dodson did not cause permanent damage to the aircraft, stating that "[t]he fuselage was not permanently bent," that "it 'popped' back into place once it was removed from the trailer." Plaintiffs' Substitute Brief in Response to Substitute Brief of Houston, p. 9. Indeed, Plaintiffs seek to assert claims against Houston that it failed to conduct a reasonable investigation, failed to use reasonable care in deciding to total the aircraft, failed to have the aircraft removed from the trailer to assess its condition, and prematurely declared the aircraft a total loss when it "could have been quickly and cheaply repaired." Second Amended Petition, ¶ 15, L.F. 272.

Plaintiffs' claim for loss of value of the aircraft is a claim for purely economic loss, because it is not measured by a reduction in the market value of the aircraft or by the cost of any repairs to the aircraft because of damage caused by Dodson. There is no evidence that any repairs to the aircraft were necessitated by the bend in the fuselage that appeared as it sat on the trailer; on the contrary, it is undisputed that the bend popped back into shape when the aircraft was removed from the trailer. Similarly, there is no evidence to support a damage award on a theory of property damage to the aircraft based on diminution of market value. No

one testified as to the value of the aircraft immediately after Dodson performed its work of retrieving and transporting the aircraft. No one testified regarding the market value of the aircraft with a bend in the fuselage, permanent or temporary. There is an absence of any evidence to quantify property damage to the aircraft claimed to have been caused by Dodson.

Plaintiffs' claim for lost value is not a measure of property damage. It is a measure of the extent to which Plaintiffs underinsured the aircraft, as Plaintiffs claim the aircraft was worth $300,000 more than the $1,500,000 paid by Houston when it declared the aircraft a total loss. The claimed loss is a purely economic loss, and not a loss due to property damage.

Plaintiffs' responsive Brief presents no argument to address Dodson's alternative argument that the trial court erred by refusing to submit two packages of instructions requested by Dodson, to submit the property damage claim on comparative fault instructions and to submit Ameristar's economic loss claim for lost profits on contributory negligence instructions. Tr. 996:20-997:9. The claimed loss of use of the aircraft by Ameristar is clearly economic loss subject to the contributory negligence defense. In this respect, the claims of the two Plaintiffs are distinct. Sierra American Corporation was the owner of the aircraft, and had leased it to Ameristar Jet Charter. Sierra had no claim for loss of use; Ameristar had no claim for property damage. The jury's finding that Ameristar was 30% at fault warrants outright reversal of the judgment for lost profits, because the claim for lost profits is for purely economic damages which is barred by Ameristar's contributory negligence.

4. Error in deviation from MAI 32.29 in mitigation of damages instruction, adding repetitive "if plaintiff reasonably should have done so" to every specification of Plaintiffs' conduct

Dodson's Brief quotes the mitigation of damages instruction given, Instruction No. 9, at pages 90-91, and sets forth the Missouri Approved Instructions for mitigation of damages, MAI 32.29 [2002 New]. Id. at 91, footnote 9. In the instruction given, unlike the approved instruction, each description of the conduct claimed to have constituted fault on the part of plaintiff or failure to mitigate damages in paragraph First of the instruction was followed by the additional words "if plaintiff reasonably should have done so." Dodson objected to the words "if plaintiff reasonably should have done so." The addition of such words deviates from MAI form, and in effect repeats the reasonableness requirement that is properly a part not of paragraph First of the instructions but of paragraph Second (that plaintiff thereby failed to use ordinary care). Such deviation from MAI is error and is presumptively prejudicial.

Plaintiffs' Brief inaccurately asserts that Instruction No. 9 "followed MAI 32.29," Response, p. 53, when it plainly did not, as is shown by simple comparison of Instruction 9 to MAI 32.29. In MAI 32.29, the jury is directed to find plaintiff failed to mitigate damages if they believe:

> First, plaintiff (*insert act sufficient to constitute failure to mitigate, such as "failed to return to work"*) . . .

The approved instruction does not posit that plaintiff "failed to return to work if plaintiff reasonably should have done so" because the issue of the reasonableness of the conduct is submitted in the next paragraph, "Second, plaintiff thereby failed to use ordinary care."

Plaintiffs' argument that there would be no failure to mitigate unless Ameristar reasonably "should have" purchased the aircraft from defendant for $1,500,000 or purchased the aircraft salvage misses the point. In MAI 32.29, the example of the description of an act

sufficient to constitute failure to mitigate is that plaintiff "failed to return to work." The plaintiff's failure to return to work could not be the basis for finding a failure to mitigate unless the plaintiff reasonably should have returned to work. However, the question of whether failure to return to work is reasonable is not submitted by adding the words "if plaintiff reasonably should have done so" to the end of the description in paragraph First, but by having the jury consider whether "plaintiff thereby failed to use ordinary care" in paragraph Second.

Plaintiffs acknowledge the addition of the phrase "if plaintiff reasonably should have done so" called for the jury to consider the reasonableness of Plaintiffs' conduct twice. The deviation from MAI raises a presumption of prejudice, and it is Plaintiffs' burden to show the erroneous instruction was not prejudicial. Plaintiffs have not borne that burden, but instead attempt to reverse the established standard as to the burden of proof and argue as if Defendant had the burden of showing prejudice. The deviation from MAI increased the difficulty of persuading the jury that Plaintiffs had failed to mitigate claimed damages, and was calculated to decrease any assessment of fault to Plaintiffs.

The addition of the words "if plaintiff reasonably should have done so" to the descriptions of conduct specified as negligence in paragraph First is confusing and misleading to the jury. It does not simply duplicate the submission of reasonable care that is properly the function of paragraph Second but it introduces the undefined normative phrase "should have" without any definition of what "should have" means. Unlike the term "negligent" and the phrase "ordinary care," which are defined for the jury in objective terms (referencing that degree of care that an ordinarily careful person would use), Tr. 659, the phrase "should have" is nowhere

defined. The inserted words "if plaintiffs reasonably should have done so" allow the jury to impose any standard of conduct it might choose to evaluate what "should have" been done. The deviation from MAI created an opening for Plaintiffs to argue for a subjective standard of conduct, and one in which the jury was asked to put themselves in Plaintiffs' position.

Plaintiffs' closing argument repeatedly emphasized the words "if plaintiffs reasonably should have done so." Tr. 1065:13-25 (regarding failure to remove the aircraft from the trailer to determine if the distortion was temporary or permanent, "and that's where I want you to focus your attention, 'if plaintiff reasonably should have done so', because there's no question we didn't take it off the trailer. I'm not going to argue that with you. The question is should Ameristar have done so; and the answer is no. Put yourself in their position."); Tr. 1067:4-6 (regarding failure to have the aircraft inspected, "that's really the same thing and it says 'if plaintiff reasonably should have done so"); Tr. 1068:1-10 (specifically with respect to Instruction No. 9 on failure to mitigate: "and then again if 'plaintiff reasonably should have done so.'"); Tr. 1071:16-20 (as to Instruction No. 9, "You have to ask yourself if you were in Ameristar's position at the time, should you reasonably have purchased the aircraft in order to mitigate your loss? The answer is no.").

Plaintiffs' argument that insertion of the words "if plaintiffs reasonably should have done so" did not affect the jury's consideration of the evidence was clearly not Plaintiffs' counsel's view in closing argument, because he stressed those words again and again to persuade the jury to find for Plaintiffs. The deviation from MAI is clear and clearly prejudicial and warrants reversal.

5. No substantial evidence that Dodson damaged the aircraft, reduced its market

value or caused Plaintiffs' claimed loss of profit

Plaintiffs' Response does not claim that there was substantial evidence to show that Dodson damaged the aircraft itself. Instead, Plaintiffs argue that Dodson's handling of the aircraft caused the fuselage to be bent as it sat on the flatbed trailer, and the bent fuselage caused Houston Casualty Company to declare the aircraft a constructive total loss. Plaintiffs do not address the uncontroverted facts that the deflection that appeared in the fuselage when it rested on the flatbed trailer was temporary and not permanent and that the deflection popped back into shape when the aircraft was removed from the trailer. These facts show that the aircraft itself was not damaged by Dodson's handling of the aircraft.

No evidence whatsoever shows that the distortion or deflection of the aircraft fuselage that appeared as it lay on the flatbed trailer in any way damaged the aircraft or reduced its market value. Plaintiffs' Response does not address the facts that when the manufacturer's representative inspected and measured the reassembled aircraft, it found that the deflection that appeared in the box section of the aircraft as it sat on the trailer was only temporary and that all measurements of the aircraft were within acceptable tolerances. Tr. 802:1-804:16. There is no substantial evidence that Dodson damaged the aircraft itself.

Plaintiffs' Response does not argue that there was any substantial evidence to show that Dodson caused any loss in market value of the aircraft. Response, pages 55-57. The uncontroverted evidence established that Sierra purchased the aircraft three months before the off-airport landing for $1,412,500, Ex. 2, and that after Houston Casualty Company paid Plaintiffs' $1,500,000 for the loss, Houston sold the aircraft to Dodson who resold the aircraft in August, 1998 to Smith Air for $1,400,000 plus the trade of another aircraft valued at

$250,000. Ex. 28 and 29. There is no substantial evidence Dodson caused any reduction in value of the aircraft.

Plaintiffs' Response argues that Plaintiffs had no "duty" to buy the aircraft, either as salvage, when it was offered to Plaintiffs by Houston in April, 1998, Tr. 983:20-984:16, or later in early May or June, 1998, when Dodson offered to sell the repaired aircraft to Ameristar for $1,500,000.00. Tr. 578:17-21. Plaintiffs explain that Ameristar passed on the opportunity to buy the aircraft from Dodson because Plaintiffs did not trust Dodson to have performed repairs competently. These arguments do not address the essential point that, because the loss of use of the aircraft after Plaintiffs made the decision not to buy it was caused not by Dodson's handling of the retrieval of the aircraft but by Plaintiffs' own deliberate decision, there was no substantial evidence to show that such loss of use was caused by Dodson. Certainly Plaintiffs were free to make whatever choice regarding reacquiring the aircraft they thought prudent, but any later loss of use of the aircraft is a consequence of Plaintiffs' choice, not of Dodson's handling of the aircraft.

Plaintiffs' assertion that the jury considered the facts in reaching their verdict fails entirely to address the point that the record reveals the lack of any substantial evidence that Dodson caused any damage to the aircraft, to its value or to Plaintiffs.

Plaintiffs' Response simply fails to address the basis for reversal set forth in Dodson's fifth Point Relied On: that there was no substantial evidence to support finding that Dodson damaged the Falcon 20 aircraft itself; no substantial evidence to support a finding that Dodson caused any loss in market value of the aircraft; no substantial, nonspeculative evidence that Plaintiffs suffered any lost profits; and no substantial evidence to show that Dodson caused

Plaintiffs' claimed lost profit in view of the temporary nature of the deflection in the aircraft's fuselage, the inspections of the repaired aircraft, its resale for more than $200,000 more than Plaintiffs paid for the aircraft four months before the off-aircraft landing, and the conscious, deliberate choice of Plaintiffs not to buy the aircraft for $1,500,000.00 in May or June, 1998.

6. Error in exclusion of Exhibit 85 and refusal to take judicial notice of FAA definition of maintenance

Plaintiffs argue that the trial court's exclusion of Defendant's Exhibit 85, which was a copy of the FAA regulation's definition of "maintenance," was not unreasonable and did not affect the outcome because Allen King recited the definition of maintenance, and that Exhibit 85 was hearsay because it was an unofficial reprint of the regulations.

Plaintiffs completely fail to address Dodson's argument that the trial court's refusal to take judicial notice of the definition of "maintenance" in 14 C.F.R. § 1.1 was plainly wrong, and that federal regulations are not hearsay, because a court may take judicial notice of federal regulations. See, 44 U.S.C. § 1507; Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 821 (Mo. banc 2000), cert. denied, 532 U.S. 990, 121 S.Ct. 1644, 149 L.Ed. 502 (2001) and numerous other Missouri cases cited at pages 101-102 of Dodson Brief.

Plaintiffs assert that Dodson failed to follow FAA regulations and failed to follow the manufacturer's maintenance manual. The claim that Dodson failed to follow FAA regulations depends entirely on the claim that the FAA regulations require the manufacturer's maintenance manual to be followed when performing "maintenance" on an aircraft. Thus, the definition of "maintenance" under the FAA regulation is all-important. 14 C.F.R. § 1.1 defines "maintenance" to mean "inspection, overhaul, repair, preservation and the replacement of parts,

but excludes preventive maintenance." In retrieving the aircraft from the levy, Dodson was not doing any of the things listed in the FAA regulation's definition of maintenance, and was not required to follow the manufacturer's maintenance manual. There is no evidence that retrieval of an aircraft from a field constitutes inspection, overhaul, preservation or replacement of parts of an aircraft and the evidence is entirely to the contrary, as Plaintiffs' expert testified that disassembly and transportation of the aircraft is not inspection (Tr. 303:22-304:1), not overhaul (Tr. 303:2-3), not preservation (Tr. 307:6-9), and that the later replacement of parts did not have anything to do with disassembling and transporting the aircraft (Tr. 307:10-308:3).

The only basis on which Plaintiffs contend that Dodson was required to follow the manufacturer's maintenance manual in retrieving the aircraft from the levy is the contention that the disassembly and transportation of the aircraft constitutes "repair." Mr. King gave his opinion that disassembly and transportation of the aircraft could be, possibly, in this case, definitely, repair. Tr. 304:4-13, 306:3-9. As a matter of law, Mr. King's legal opinion is wrong. Disassembly of a downed aircraft at an off-airport landing site and transportation of the aircraft over the highways to a hangar is not "repair" of the aircraft, as a matter of law. There is no substantial evidence to show that Dodson violated any FAA regulation or failed to follow any applicable procedure in the disassembly and transportation of the aircraft.

Plaintiffs argue Dodson violated federal regulations, improperly relying on evidence not in the record regarding statements of Vincent Sipes. Plaintiffs cite Tr. 601:25-602:18; 603:23-604:10; 604:16-605:13 to support assertions regarding what Mr. Sipes supposedly said. See Plaintiffs' Supplemental Brief, 14, 59. The statements of Mr. Sipes on which Plaintiffs rely were not in evidence. Plaintiffs' attorney asked J.R. Dodson if he had hired an

expert named Vincent Sipes, and Mr. Dodson testified "No, sir," but said he believed his lawyers may have. Tr. 601:25-602:6. Mr. Dodson testified he did not know whether Mr. Sipes was designated as an expert on Dodson's behalf. Tr. 602:7-9. Mr. Dodson acknowledged seeing Mr. Sipes' name in Dodson's designation of expert witnesses, and that he was designated to testify regarding "FAA rules and regulations and the proper interpretation of the same." Tr. 602:10-18. Mr. Dodson testified he was not aware of Mr. Sipes' testimony on the application of the FARs (Tr. 602:19-23), that he did not have any idea what the retained expert testified to with regard to the FARs (Tr. 602:24-603:1), that he did not know Mr. Sipes' deposition was taken in this case (Tr. 603:2-4), and that he had never considered Mr. Sipes' opinion when Mr. Dodson formed his opinion that his conduct was not maintenance under the FARs (Tr. 603:5-10). Mr. Dodson testified that he was not aware that his own expert, the guy he was paying, said that what Dodson did is maintenance under the FARs or that Dodson's conduct was covered by and violates Section 43.13 of the FARs, saying, "No, I wasn't aware of it, and I don't agree with it." Tr. 603:23-604:22. The deposition of Vincent Sipes was not presented to the jury other than by way of these questions to Mr. Dodson whether he was aware or knew that Mr. Sipes had testified that Dodson's conduct violated the regulations, and Mr. Dodson's answers were uniformly that he was not aware of it, did not agree with that, and had never read the deposition. Tr. 604:23-605:9. The only matter in evidence with respect to Mr. Sipes' deposition testimony was that Mr. Dodson was not aware of what Plaintiffs' attorney asserted Mr. Sipes had said. This testimony does not support Plaintiffs' argument that exclusion of the FAA definition of maintenance was not prejudicial.

Plaintiffs' attempt to downplay the prejudicial impact of the trial court's refusal to take

judicial notice of the federal regulation in issue is without merit. Dodson's counsel offered the FAR definition of maintenance in Exhibit 85, and the trial court excluded the definition, stating "that regulation, in and of itself is, in fact, hearsay and you can't admit it." Tr. 534:3-5. Dodson's counsel then requested the court take judicial notice of the regulation and allow the document to be introduced, and the trial court stated that it could only do that if Dodson's counsel had agreement of opposing counsel or had "an authenticated copy of the document." Tr. 534:4-15. This ruling was erroneous. Judicial notice of the federal regulation defining "maintenance" requires neither agreement of opposing counsel nor an authenticated document. Federal statute mandates that federal regulations "shall be judicially noticed," 44 U.S.C. § 1507, and many Missouri cases have held that federal regulations may be judicially noticed and considered as evidence. See cases cited in Dodson Brief, 101-102. The trial court's ruling that the federal regulation defining "maintenance" under the FARs was hearsay and could not be judicially noticed was clearly erroneous.

The trial court's refusal to take judicial notice of the definition of maintenance precluded Defendant from presenting the case that the regulation did not require following the manufacturer's maintenance manual because Defendant was not engaged in "maintenance." Prejudice followed because the verdict directing instruction (Instruction No. 7) hypothesized that Defendant violated FAA regulations, on the assumption that retrieval and transportation of the aircraft constituted "maintenance" under the FARs.

Plaintiffs argue that Mr. King's paraphrase of the definition of maintenance, in the context of Mr. King's insistence that retrieval of the aircraft from the levy constituted "repair," removed the prejudice of excluding Exhibit 85 from evidence and refusing to judicially notice

the regulatory definition. The opposite is true: Mr. King's distorted presentation of the meaning of "maintenance" under the regulation is what made introduction of the regulation itself important.

Plaintiffs do not address in any way the argument that even if the regulation were hearsay and not capable of being judicially noticed, it should have been admitted under the doctrine of curative admissibility to rebut Mr. King's statements about the regulation. If the regulatory definition of maintenance were hearsay, which Defendant at all times denies, Plaintiffs' having referred to the definition requires that Defendant be allowed to introduce the definition to refute any negative inferences. See cased cited at 103-104 of Defendant's Substitute Brief. Plaintiffs' responsive Brief in effect admits that Plaintiffs opened the door to introduction of the regulation's definition of "maintenance" by the testimony of Mr. King. The trial court's rulings left the jury with only Plaintiffs' inaccurate characterization of the regulation's contents and meaning. Such rulings produced the verdict because the verdict directing instruction posited violation of the regulation and failure to follow the manufacturer's maintenance manual as specifications of negligence.

7. Plain error in repeated argument improperly urging jury to put themselves in Plaintiffs' position

Plaintiffs argue that Dodson's failure to object to Plaintiffs' repeated appeal to the jury to put themselves in Plaintiffs' position precludes any complaint on appeal. Dodson acknowledges the error was not preserved by objection, but requests this Court to review the claim of error, in its discretion, under the plain error rule. The argument that the jury should put itself in one party's position has been universally condemned as improper, even abhorrent.

A jury that accepts the invitation to put themselves in one party's position violates their oath and ignores instructions on the burden of proof and proper consideration of evidence. A hundred years of cases condemning this improper form of argument have failed to take away its allure, because they do not remove the financial reward for using it. A decision that a verdict obtained by urging the jury to put itself in one party's position will be reversed would remove this financial incentive.

8. Excessiveness of verdict

Plaintiffs argue that the size of the verdict alone is insufficient to show bias, passion, prejudice or sympathy in the absence of a showing that the verdict was glaringly unwarranted "and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury." Dodson does not rely solely on the size of the verdict, but has presented multiple errors in addition to improper argument which constitutes misconduct responsible for prejudicing the jury. The errors identified above, including the error in the trial court's failure to allow introduction or to take judicial notice of the federal regulation's definition of maintenance, deviation from MAI in the mitigation of damages instruction, error in refusing to give a contributory negligence instruction, submission of lost profit claims on speculative and insufficient evidence of net profit, coupled with Plaintiffs' repeated argument improperly urging jury to put themselves in Plaintiffs' position, comprise trial error and misconduct that establish a basis for finding the jury was prejudiced. Plaintiffs' argument that the verdict was not excessive because Plaintiffs asked for a larger award is unconvincing. The award of $1.42 million dollars against Dodson on a record showing Dodson caused no permanent damage to the aircraft, where the award is primarily for claimed loss of use of an aircraft that Plaintiffs

chose to forego reacquiring is excessive and any portion representing lost profit should be remitted, and the multiple trial errors and improper closing argument employed by Plaintiffs support a finding the verdict was the product of bias, passion or prejudice.

CONCLUSION

For the foregoing reasons, Dodson International Parts, Inc. respectfully suggests that this Court should reverse the Judgment of the trial court and remand the case with instructions that the trial court enter Judgment in favor of Dodson International Parts, Inc., or order remittitur of all amounts representing claimed lost profits or in the alternative that this Court reverse and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the diskette accompanying this Brief has been scanned and found to be free of viruses; that this Brief contains 7,724 words and 589 lines of text exclusive of the cover, certificate of service, certificate required by Missouri Supreme Court Rule 84.06(b) and signature block and complies with the limitations contained in Rule 84.06(b); and that on this 20th day of August, 2004, one copy of this Brief in the form specified by Rule 84.06(a) and one copy of the disk required by Rule 84.06(g) was mailed, via U.S. Mail, postage prepaid, to:

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